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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 407

RALPH NEELY,

Petitioner,

v.

HOUSTON OILERS, INC.,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI

ANGUS G. WYNNE,
2808 Southland Center,
Dallas, Texas 75201,
Counsel for Petitioner.

WARLICK PRESS, INC.—2203 VALDINA STREET—DALLAS—ME 1-3130

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Ralph Neely prays that this Court grant rehearing of its order of October 10, 1966, denying the Petition For A Writ of Certiorari and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in the above-entitled case as prayed for in the Petition.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. A substantial ground for granting certiorari in this case not previously presented to this Court, is that the animosity and ill-will of the Court of Appeals for the Trial

Judge, Stephen S. Chandler, deprived the Petitioner of a fair review of his case in the Court of Appeals. Attorneys for Petitioner originally chose not to raise this ground because they felt that their Petition For A Writ of Certiorari presented sufficient grounds, without the necessity of exploring such an unpleasant subject. However, subsequent to the filing of the Petition, Judge Chandler himself raised the point, by inquiring of Petitioner's attorneys in open court whether such ground has been raised and asserted in the Petition. Judge Chandler called the attorneys' attention to the fact that the opinion of the Court of Appeals had, in effect, referred to him as "irrational." In this connection, Petitioner will also demonstrate that the Tenth Circuit's "irrational" comment applies equally as well to the Supreme Court of Texas.

This Honorable Court is well aware of the conflict and hostility between Judge Chandler and the Court of Appeals. It has been presented to this Court in pending Case No. 1111, Misc., *Stephen S. Chandler, United States District Judge for the Western District of Oklahoma, Petitioner v. Judicial Counsel of the Tenth Circuit of the United States, Respondent.* However, it is wholly unnecessary to go outside the record of this very case to find such hostility adequately demonstrated.

That the animosity and hostility of the Court of Appeals toward Judge Chandler affected their opinion is demonstrated by the Court's opinion in passing upon (a) Respondent's fraudulent inducement of the contract, (b) the Texas

Statute of Frauds, and (c) the doctrine of unclean hands; each of which will be discussed separately below.

a. *Respondent's Fraudulent Inducement of the Contract.* Relying upon Petitioner's testimony that Respondent's president promised him that the football contracts would remain undated, that they would be kept secret, and that they would therefore not become effective until after January 2, 1965, Judge Chandler found as a fact that Petitioner "relied on the representations of Adams as to his eligibility if the agreement was kept secret and the agreement of Adams and Martin to keep it secret. He was thereby induced to execute the instruments." (Appendix B-6 of Petition) In overruling this finding of fact, which was supported by testimony in the record, the Tenth Circuit opinion noted that "the contracts provide in plain language that they shall be valid and binding immediately upon execution and that a copy shall be filed with the League Commissioner within ten days thereafter." The opinion then asserts that "*any rational consideration* of the evidence leads to the conclusion that all the parties knew that if Neely signed a professional football contract and received money therefor * * * he would consequently become ineligible to compete in the post-season game."

Further, the necessary effect and implication of the Tenth Circuit's comment quoted above, is that no "rational consideration of evidence" can lead to the conclusion that a party can believe, and rely upon, representations which are contradicted by the plain language of the contract he executes. In other words, the Tenth Circuit has stated that

it was irrational to conclude that Petitioner could believe, and rely upon, a representation that the contract would not be effective (protecting his eligibility) because the plain language of the contract contradicts such representation. If those Judges really believe this proposition, then they must also feel that the Supreme Court of Texas is "irrational", because that distinguished court held in 1957 that a party could indeed believe, and rely upon, fraudulent representations which were absolutely contradicted by the language of the contract. In *Dallas Farm Machinery Company v. Reaves*, 307 S.W. 2d 233, the Texas Supreme Court held that a party could predicate a claim of fraud upon representations which were contradicted in the contract, noting that if a contract is voidable on account of fraud in its inception, then each and every portion and clause thereof is unenforcible, including the clause alleged to contradict the representation. In arriving at this result, the Supreme Court reviewed a long line of conflicting decisions on the subject, and adopted the foregoing rule as the law of Texas only after lengthy deliberation. In doing so, the Court quoted with approval from, and adopted the rule announced in, *Texas & N.O. Ry. Co. v. Thompson*, 12 S.W. 2d 963 (Comm. App. 1929), where a party was allowed to set aside a release on the grounds of a fraudulent promise of employment made to induce him to sign the contract, *despite a specific recitation in the release that no promise of employment had been made.*

It was stipulated by the parties in this case that the law of Texas governed the entire transaction, and the Tenth

Circuit's opinion acknowledged this fact. Yet, the opinion completely disregarded a conclusion by the Trial Judge which was in accord with a Supreme Court of Texas ruling, and supported by the evidence, with the gratuitous comment that "no rational consideration of the evidence" could lead to such a conclusion. The point is made even stronger when the Tenth Circuit's opinion is examined in light of its earlier pronouncements, under Rule 52 of the Federal Rules of Civil Procedure, against overturning the Trial Court's findings of fact. For example, the opinion in question, written by Judge Pickett, is a rather abrupt departure from the rule announced by the same Judge in *Lindsey v. Oregon-Washington Plywood Co.*, 286 F. 2d 710 at 711 (10 Cir. 1961);

> "Findings of fact are presumptively correct, and will not be set aside on appeal unless clearly erroneous. Fed. R. Civ. P. 52(a), 28 U.S.C.A.; Walker v. Wiar, 10 Cir. 276 F. 2d 39. On appeal, the evidence is to be viewed in the light most favorable to the prevailing party, and the trial court's findings on factual issues are binding upon appellate courts unless clearly erroneous. Milton v. Granite State Fire Ins. Co., 10 Cir. 196 F. 2d 988."

Petitioner did not choose his forum and sincerely regrets that he has become involved in this controversy. Nevertheless, when an Appellate Court believes a Trial Judge to be irrational, and goes out of its way to call him irrational in their opinion in Petitioner's case, Petitioner has cause to believe that the Appellate Court's hostility toward the Trial Judge played a part in their rendering such opinion. Petitioner must protest this denial of elementary principles of justice and due process.

b. *The Texas Statute of Frauds.* While purporting to recognize and follow applicable Texas law, the Tenth Circuit's opinion completely ignored and disregarded long followed precedents and decisions of the Texas Supreme Court, while allowing an obscure and clearly inapplicable intermediate court decision, *Tiller v. Fields*, 301 S.W. 2d 185 (Tex. Civ. App. 1957, NWH), to govern its holding. Even the author of the *Tiller* case, Justice Fanning, conceded the decision to be an extraordinary graft on the statute of frauds, founded on public policy, and based on the peculiar nature of *oil lease unitization agreements*, which must, "of necessity, be in general terms." In applying the peculiar rule of the *Tiller* case to the contract in this case, the Tenth Circuit had to absolutely disregard, and create direct conflicts with, *Stekoll Petroleum Co. v. Hamilton*, 255 S.W. 2d 187 (Texas Supreme Court 1953); *Taber v. Pettus Oil and Ref. Co.*, 166 S.W. 2d 959 (Comm. of App. 1942, opinion adopted by the Supreme Court); *Fagg v. Texas Co.*, 57 S.W. 2d 87 (Comm. of App. 1933, decision adopted by the Supreme Court); and *Cantrell v. Garrard*, 240 S.W. 533 (Comm. of App. 1922, opinion adopted by Supreme Court). These cases are more fully discussed in the Petition, pages 16-17.

c. *The Doctrine of Unclean Hands.* In reversing Judge Chandler's ruling, this Tenth Circuit panel had to disregard not only rulings of the Texas Supreme Court, but also an identical case by the Fifth Circuit Court of Appeals, i.e., *New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc.*, 291 F. 2d-471 (1961). This Fifth Circuit case *cannot* be distinguished from the case at bar. (Response to Brief in Opposition, pages 3-5)

Petitioner respectfully submits to this Honorable Court that the unseemly conflict between the Tenth Circuit and Judge Chandler, especially when it affects innocent litigants, can have no other effect than to weaken the entire foundation of our judicial system. If enmity and personal feelings creep into judicial decisions and rulings, our citizens are bound to lose their faith and confidence in our administration of justice. Only this Honorable Court, by granting the certiorari requested and affording Petitioner an impartial review, can forestall this erosion of confidence in the Federal judicial system.

2. Since the Petition was denied by this Honorable Court, an entirely new lawsuit has been filed in a Texas court which forcibly proves the soundness of Petitioner's assertion that parties indispensable to a full and final adjudication of this controversy were never before the court. Of even greater importance, however, is the fact that such new lawsuit threatens to *entirely deprive Petitioner of his livelihood!*

In his Petition, Petitioner asserted that Dallas Cowboys Football Club, Inc. ("Dallas") was an indispensable party to this case, inasmuch as Respondent sought to enjoin Petitioner from performing services for Dallas under a written contract for such services; the necessary effect of such injunction, if entered, being to deprive Dallas of Petitioner's services and thereby effectively invalidate the Dallas contract. Petitioner asserted to this Court that no final adjudication could be made of this controversy in the absence of Dallas.

The danger to Petitioner's career and livelihood, by the omission of Dallas from this case was emphatically brought home when, on October 31, 1966, Dallas filed a suit in the State District Court in Dallas, Texas, against Petitioner, Respondent and Ada Oil Company for a declaratory judgment that Dallas' contract with Petitioner is valid, and praying for an injunction to prevent Petitioner from performing services for the Respondent under the contract which the Tenth Circuit has held valid and binding upon Petitioner.

Petitioner is now faced with the distinct possibility that he will be absolutely barred from pursuing his profession, and all because a Federal court has ignored the lack of an indispensable party and has erroneously decided this case *contrary to Texas law.* In other words, Petitioner has little confidence in his ability to defeat Dallas' claim, because Dallas is pursuing its remedy in a Texas court, which will not disregard decisions of the Texas Supreme Court. Yet, because the Tenth Circuit has refused to follow such authorities, Petitioner may very well be enjoined from his profession by conflicting rulings between State and Federal courts; both of them purporting to follow one law.

Such an anomalous situation, and Petitioner's dilemma, would be farcical if the consequences were not so severe. However, Petitioner can find little humor in a situation which effectively impairs his ability to earn a living for his family. Furthermore, even if Petitioner's personal quandry does not warrant this Court's resolution of the impending conflict, Petitioner submits that any such result will have an intolerable effect upon our jurisprudence. This Honorable Court

is already on record about the relationship of Federal decisions, in diversity cases, to applicable State law, and no such conflict as is presented by the situation before this Court should be countenanced.

3. At the time of filing the Petition for a Writ of Certiorari in this case a merger between the two principal professional football leagues had been approved by the two leagues. The leagues had been assured that the violations of federal anti-trust law accompanying the merger would be eliminated by special legislation of the United States Congress. Had that special legislation been passed the necessity of your hearing the case at bar and thereby settling the conflict between this case and the *Giants* case of the Fifth Circuit would not have been so imminent. If the provision of the merger which provides for a common draft of players of the teams had been excluded from anti-trust violation, the competition in signing players and the law suits resulting therefrom, such as that at bar, would have been substantially reduced.

The legislation passed concerning the merger does not exempt from anti-trust violation the common draft. The sole effect of the legislation is to permit the combination of the two leagues into a single league. It was the intent of both the House and Senate that the combined league have no greater anti-trust immunity than the existing leagues enjoyed. *Statement of the Managers on the Part of the House, on Amendments to H.R. 17607.* Because the common draft was not exempted by legislation the merger has not necessarily affected the situation posed by the conflicting cases. If the common draft is not accomplished cases in the nature

of the conflicting cases will occur with increasing frequency and the existence of the two conflicting decisions will be intolerable.

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, it is respectively urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

ANGUS G. WYNNE,
Counsel for Petitioner.

November 4, 1966

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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Angus G. Wynne